PARTIES:	EMILY JAKO
	v
	THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	9724802
DELIVERED:	16 November 1998
HEARING DATES:	13 November 1998
JUDGMENT OF:	Kearney J

CATCHWORDS:

JURISDICTION, PRACTICE AND PROCEDURE – BAIL - unintentional breach – revoked by magistrate – application for fresh bail – whether common law authorities on bail still apply – relevance of offence seriousness

Bail Act, ss7A(2), 24(1)(a), 24 (1)(c)(iii), 38(1)(b)(i)

R v Mahoney-Smith (1967) 87 QWN (Pt 1) (NSW) 249, referred to.
Burton v The Queen (1974) 2 ACTR 77, referred to.
Chester v The Queen (1988) 36 A Crim R 382, distinguished.
Veen v The Queen [No.2] (1987-88) 164 CLR 405, distinguished.

REPRESENTATION:

Counsel:

Applicant:	K. Kilvington
Respondent:	J. Watson

Solicitors:

Applicant:	CAALAS
Respondent:	Office of the Director of Public Prosecutions

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kea98031

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. 9724802

BETWEEN:

EMILY JAKO
Applicant

AND:

THE QUEEN
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 16 November 1998)

The applicant has been in custody since 27 October. On 13 November she applied to be bailed until her trial commences on 15 February 1999; I heard submissions from her counsel Mr Kilvington, and from Mr Watson for the Crown, and rule on the application today.

The background

I was informed as follows. On 12 June 1998 the applicant was committed for trial on various charges, and admitted to bail on various conditions. She was to reside at Ukarka farm and not to enter Alice Springs except for the purpose of seeking medical attention either for herself or for her partner Mr Blau.

On appearing before this Court on 7 September pursuant to that committal, an Indictment was filed charging her (together with 2 other women), with the aggravated robbery and murder of one Edeltraud Thomas on 4 November 1997, and with the aggravated unlawful use of a motor vehicle on that date. Bailey J admitted the applicant to bail, on similar terms and conditions to those on which she had been bailed on committal on 12 June. However, her bail was now conditioned on her not entering Alice Springs except for the purpose of securing medical attention for herself; no mention was made of Mr Blau in that regard. It seems that the failure to mention Mr Blau may have been an oversight by counsel.

The applicant was subsequently charged on 26 October with having unlawfully entered a shop in Alice Springs that evening, causing criminal damage, and stealing therefrom. She was bailed by the Police on those charges.

On 27 October the Director of Public Prosecutions obtained a warrant for her arrest, pursuant to s38(1)(b)(i) of the *Bail Act*, on the ground that on

26 October she had entered Alice Springs in breach of the conditions of her bail of 7 September. Mr Kilvington informed me that she was in Alice Springs on that occasion, accompanying Mr Blau who had medical appointments on 27 and 28 October. She had not (nor had her then lawyer) noted that the condition of bail of 12 June as regards Mr Blau had not been continued on 7 September, and so her breach of her condition of bail was unintentional. That was not disputed, and for present purposes I accept that explanation.

The applicant was arrested pursuant to the warrant of 27 October and brought before Ms Deland SM on 28 October. After a hearing, and pursuant to s38(2)(b) of the Act, her Worship revoked the applicant's bail of 7 September pursuant to s38(3)(b), and committed her to prison for trial on 15 February 1999.

As noted earlier, on 13 November the applicant applied for fresh bail, pursuant to s38(4) and s6(b) of the Act. In light of the charge of murder which she faces, she is not to be granted bail unless she "satisfies …[the] Court that bail should not be refused;" see s7A(2). The onus lies on the applicant in that regard.

The submissions on the application

I consider that it is clear that the learned Magistrate was empowered by s38(2)(b) of the Act to make the order made on 28 October. The limits on the power to *review* bail in s34 do not apply to the provisions for non-compliance with bail conditions in Part VII in general, and to s38 in particular.

Mr Kilvington informed me that the applicant would reside with Mr Blau at Ukarka farm, some 250 kilometres from Alice Springs, and that he would provide transport for her to Alice Springs. Mr Kilvington submitted that, as regards the criteria in s24 of the Act, there was every likelihood she would appear to stand her trial on 15 February 1999.

Mr Watson observed that in the past, the applicant had been dealt with for breach of conditions of bail, on 10 June 1998 and 1 November 1982.

Her previous criminal history shows that there were cases involving charges against her mentioned on some 73 occasions in courts, between November 1966 and June 1998. Her first sentence of immediate imprisonment, 1 month, was imposed on 11 November 1974. She has since received about 30 sentences of immediate imprisonment, usually of a few days or months. Her longest sentence was 2 years imprisonment, with a non-parole period of 4 months, imposed on 7 September 1977 in this Court, for break enter and steal.

I note that she was convicted on 17 July 1998 of receiving stolen property on 4 November 1997, and sentenced to 3 months imprisonment. On 27 July 1998 she appealed against that conviction and sentence; her appeal has not yet been heard, and she is presently bailed as regards that appeal hearing.

Mr Watson also noted that the applicant had failed to appear in Court when required to attend, on some 6 occasions between 1991 and 1997.

Against that background Mr Watson submitted as regards s24(1)9a) of the Act that the applicant was not a "good risk" to appear at her trial, if now bailed. Further, in terms of s24(1)(c)(iii) her record disclosed that it was likely that she would commit an offence, while at liberty on bail. For both reasons, he submitted, the application for bail should be refused.

Mr Kilvington noted that the applicant had previously been given bail on the present charges; see p2. The only fresh matter which had arisen since then was her alleged offence of 26 October. He submitted that she remained likely to appear at her trial in February 1999, so s24(1)(a) of the Act was satisfied. Accordingly, he submitted, the only real question in issue arose under s24(1)(c)(iii) – the likelihood that she would commit an offence while on bail.

He submitted that in taking into account and balancing the various criteria in s24(1)(a), (b) and (c), an element of judicial discretion was involved. He referred to various authorities at common law, decided prior to the introduction of the various common form Bail Acts in the various Australian jurisdictions. Of these, cases such as *R v Mahoney-Smith* (1967) 87 WN (Pt 1) (NSW) 249, and *Burton v The Queen* (1974) 3 ACTR 77 emphasized that the grant or refusal of bail is determined fundamentally on the probability or otherwise of the applicant answering to bail; Mr Kilvington submitted that this approach still held, with the result that this consideration, now embodied in

s24(1)(a) of the Act, took precedence over the other considerations in s24, including s24(1)(c)(iii). Further, cases such as *R v Young* (1966) 83 WN (Pt I) (NSW) 391 indicate that it was the commission of *like* offences while on bail which is a relevant consideration.

Mr Kilvington appeared to attack the principle which lies behind s24(1)(c)(iii) of the Act, relying on the principles enunciated in the sentencing case of *Veen v The Queen [No.2]* (1987-88) 164 CLR 405, relating to the significance to sentencing of the risk of recidivism; in particular, he relied on the rejection in that case of any support in Australia for the principle of preventive detention to which, he submitted, s24(1)(c)(iii) was directed. He submitted that the principles enunciated in *Veen* (supra) must apply to the construction of s24 of the *Bail Act*. By way of support, he referred to *Chester v The Queen* (1988) 36 A Crim R 382 at 386-8. That case involved the construction of s662(a) of the *Criminal Code* (WA) which provides for the circumstances in which prisoners may be ordered to be further kept in detention, during the Governor's pleasure, at the expiration of their terms of imprisonment. In s662(a) of the Code, one of the matters to which the Court is directed to have regard is "the nature of the offence"; the High Court considered that s662(a) was directed at the continued detention *only* of persons with a propensity to commit serious crimes amounting to crimes of *violence*. Bearing in mind the principles in *Veen* (supra) the Court considered at 387 that s662(a) was -

> "… confined to very exceptional cases where the exercise of the power is demonstrably necessary to protect society from *physical harm*" (emphasis added)

The Court contrasted such crimes with "crime which is serious but non-violent"; it considered that further detention under s662(a) of offenders with a propensity to commit serious but non-violent crimes would be "a disproportionate response to that need for protection".

By analogy, Mr Kilvington submitted that a likelihood to commit crimes such as break, enter and steal, should not be regarded as attracting s24(1)(c)(iii) of the Act.

Conclusions

It is clear in my view that, on consideration of the applicant's criminal history, she is quite likely to commit a property offence if at liberty to appear for her trial on 15 February 1999. The offences upon which she will stand her trial in February 1999 include crimes of violence. Her previous record shows one conviction for assault and one conviction for an aggravated assault in the last 10 years; it cannot be said that this history shows that she is likely to commit a crime of violence whilst on bail.

I do not consider that s24(1)(c)(iii) of the Act should be construed in the way that s662 of the *Criminal Code* (WA) was construed in *Chester's* case. Of course, the *seriousness* of the offence in question in s24(1)(c)(iii) of the Act is relevant, since what is in issue under s24(1)(c) is the protection and welfare of the community. I do not consider that the offences referred to in s24(1)(c)(iii)

must be ‘like’ offences to those charged in the Indictment; in the present case I do not think that s24(1)(c)(iii) is activated only if the likelihood relates to crimes of violence.

I do not consider from the applicant’s criminal history that it can be said she is not a ‘good risk’ of appearing to stand her trial on 15 February 1999.

I do not consider that the considerations in s24(1)(a) take precedence over those in the other paragraphs of s24(1). All of the considerations specified in those paragraphs which are relevant to the particular case are to be taken into account, the result of the balancing being a matter for judgment. The cases decided prior to the *Bail Acts* are of limited utility, in light of the clear provisions of s24. Section 24 is to be construed according to its terms; I do not consider that the principle in *Veen* (supra) has any effect upon the construction of s24(1)(c)(iii).

I bear in mind the certificate by the applicant’s medical practitioner, pointing to the desirability that she not be remanded in custody pending trial. As to that, I note that it is important that she receive all requisite medical attention whilst she is in custody.

In light of the foregoing, and having particular reference to s24(1)(c)(iii), I do not consider that the applicant has discharged the onus on her under s7A

of the Act; I refuse the application for bail of 13 November and remand the applicant in custody until 15 February 1999.

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